132 (5) No. 08-1098

Supreme Court, U.S.
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In The

Supreme Court of the United States

NANCY MADSEN,
Individually and on Behalf of
All Others Similarly Situated,

Petitioner,

vs.

JP MORGAN CHASE BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITION FOR REHEARING

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SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

Petitioner Nancy Madsen ("Madsen"), individually and on behalf of all others similarly situated, respectfully petitions for rehearing of the order of the Court dated June 8, 2009, denying the *Petition for Writ of Certiorari* to the Utah Supreme Court. This *Petition for Rehearing* is brought pursuant to Rule 44.2 of the *Rules of the Supreme Court of the United States*, based on substantial grounds not previously presented and an intervening circumstance of substantial effect.

1. CERTIORARI SHOULD BE GRANTED TO ENCOURAGE COURTS AND COUNSEL TO CONSERVE JUDICIAL TIME IN FEDERAL PREEMPTION CASES THROUGH THE USE OF INTERLOCUTORY APPEALS.

A. HISTORY OF GROUNDS PREVIOUSLY PRESENTED

Madsen's original *Petition for Writ of Certiorari* (at p. 6) emphasized that federal preemption is the ultimate "trump card." Madsen's original *Petition* (at p. 7) went on to argue that:

> Of course, there are thousands and thousands of other cases pending in courts throughout the United States where federal preemption is an issue. And if judges in those cases delay ruling on preemption, until somewhere in the *middle* or the *end* of the case, **millions of judicial hours will be wasted**.

> In summary, certiorari should be granted, so that this Court can give a *stern warning* to lawyers and judges, throughout the land, that issues of federal preemption should be heard in the beginning of a case – and not delayed until the *middle* or the *end* of the case.

B. SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

As stated above, Madsen's original argument was that **millions of judicial hours will be wasted** when issues of preemption are not raised until the end of the case.

In opposition, the Bank (Prudential) has argued that it did not wait until the end of the case to raise the issue of preemption. The Bank (Prudential) asserted that:

> In 1985, on the eve of trial, the trial court denied Prudential's motion for summary judgment which argued that Madsens' claims were preempted by federal regulations.

Brief in Opposition at p. 4, ¶8.

However, when the Bank's (Prudential's) *Motion for Summary Judgment* was denied in 1985, the Bank (Prudential) could have (but did not) file a Petition for Interlocutory Appeal under Rule 5 of the *Utah Rules of Appellate Procedure* (equivalent to 28 U.S.C. § 1292(b), except that the trial court need not grant permission to appeal). If an interlocutory

appeal had been filed, the Utah Supreme Court might have ended the case by 1987 on the identical grounds (federal preemption) that were relied upon by the court in *Madsen IV* in 2008 (*Madsen v. Washington Mutual Bank fsb*, 2008 UT 69, 199 P.3d 898) (Appendix A to *Petition for Writ of Certiorari*). Or stated in other words, **21** years of judicial time could have been saved (between 1987 and 2008) if the Bank (Prudential) had filed a Petition for Interlocutory Appeal in 1985, instead of waiting until 2006 to raise this issue in a cross-appeal.

Although federal circuit courts have encouraged the use of interlocutory appeals,[1] such encouragement by this Court will surely increase the appropriate use of interlocutory appeals in federal preemption cases.[2] And again, **millions of hours of judicial time will be saved** if interlocutory appeals are used more frequently in federal preemption cases.

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[1] See, e.g., *In re Coastal Plains, Inc.*, 179 F.3d 197, 204 (5th Cir. 1999) ("Most unfortunately, Browning did *not* seek certification . . . pursuant to 29 U.S.C. § 1292(b)").

[2] Madsen is not suggesting this Court require a petition for interlocutory appeal every time a motion for summary judgment is denied. But it would be helpful for this Court to point out that this avenue should be considered favorably by attorneys and judges in federal preemption cases.

C. REASONS WHY THE ISSUE OF INTERLOCUTORY APPEAL WAS NOT RAISED IN THE ORIGINAL PETITION FOR WRIT OF CERTIORARI

Madsen's original *Petition for Writ of Certiorari* argued that **millions of judicial hours will be wasted** where judges delay ruling on preemption until the middle or the end of the case.

The purpose of the *Petition for Rehearing* is simply to present one *specific* procedure on *how* the issue of preemption can be resolved early in the case.

D. IMPORTANCE OF CERTIORARI IN THIS CASE

There are literally tens of thousands of federal preemption cases pending around the country. Each federal preemption case is a mixture: A claim under state law **and** the legal question of whether the claim under state law has been preempted (or taken away).

But when the issue of preemption is delayed, the loss of time and extra work for the courts is overwhelming. As stated in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 112, 118 S.Ct. 1003, 1021, 140 L.Ed.2d 210 (1998) (Breyer, J., concurring), "a more cumbersome system . . . increases . . . the risk of the 'justice delayed' that means 'justice denied.'" The instant case is the perfect example of how decades of court time can be wasted.

Thus the purpose of certiorari in this case is to give guidance and specific procedures on avoiding such horrible delays in reference to preemption cases.

2. CERTIORARI SHOULD BE GRANTED BECAUSE THE UTAH SUPREME COURT ERRED BY CONSTRUING THE TERM "INTEREST" IN A FEDERAL REGULATION TO INCLUDE "PROFITS."

Although there are several issues which Madsen would argue in a brief on the merits in this matter (including issues raised in Madsen's original *Petition for Writ of Certiorari* and in Madsen's briefs before the Utah Supreme Court), Madsen will not repeat all of them in this document. However, the substantial grounds not previously presented to this Court would include one particularly important issue that goes to the merits. That issue is the fact that in *Madsen IV* (*Madsen v. Washington Mutual Bank fsb*, 2008 UT 69, 199 P.3d 898) (Appendix A to *Petition for Writ of Certiorari*), the Utah Supreme Court construed the term "interest" in the federal regulation to include the term "profits" as used by the Utah Supreme Court in *Madsen I* (*Madsen v. Prudential Federal Savings & Loan Ass'n*, 558 P.2d 1337 (Utah 1977)) (Appendix F to *Petition for Writ of Certiorari*).

A. THE APPLICABLE REGULATION ONLY RESTRICTED THE PAYMENT OF "INTEREST."

The pertinent federal regulation (12 C.F.R. § 545.6-11(c))[3] states in part:

> Except as provided by contract, a Federal association shall have no obligation to pay *interest* on escrow accounts apart from the duties imposed by this paragraph. [Emphasis added.]

Madsen I (at 1338, App. F3) dealt with the contractual term "pledged," and found that a pledgor is entitled to an accounting by the pledgee of the profits earned from what was pledged.

> The pledgee has the duty to account to the pledgor for the increase or profits accruing to the pledgee as a result of the possession of the pledged chattel.

Madsen I, at 1340 (See App. F8 to *Petition for Writ of Certiorari.*)

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[3] In *Madsen IV*, the Utah Supreme Court also relied on an older regulation, 12 C.F.R. § 544.1, "Prudential 'is not required to distribute earnings on short-term savings accounts.'" *Madsen IV* at ¶23, App. A15. However, this general rule merely states that the Bank (Prudential) was not *required* by regulation to distribute *earnings*. However, the above language does not prevent the Bank (Prudential) from *voluntarily contracting* to pay *earnings*. (See *Madsen I*, 558 P.2d at 1338, App. F1: "The action is founded upon terms of a deed of trust . . . to determine . . . the legal consequences pursuant to such terms.")

The federal regulation quoted above refers to *interest*, making no mention of *profits* or *earnings*. The plain language of the regulation does not prevent payment of the profits or earnings which the Utah Supreme Court found had to be paid by a pledgee.

B. AN INTERVENING CIRCUMSTANCE OF SUBSTANTIAL EFFECT DEMONSTRATES THE NEED FOR A REHEARING.

Since denying Madsen's *Petition for Writ of Certiorari*, this Court decided the case of *Cuomo v. Clearing House Ass'n, L.L.C.*, ___ U.S. ___, ___ S.Ct. ___, No. 08-453, 2009 WL 1835148. After granting certiorari in that case, this Court pointed out that the terms "visitorial powers" had been interpreted too broadly in their preemptive effect. Likewise the Court should grant certiorari in this case and point out that the term "interest" has been interpreted too broadly in its preemptive effect.[4]

The instant matter and the *Cuomo* case exemplify the need for this Court to emphasize the rule of construction found in *Altria v. Good*, ___ U.S. ___, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008) (internal quotation marks omitted):

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[4] In 2008, the Utah Supreme Court concluded (in the instant case) that a federal regulation governing "interest" payments preempted Madsen's claim for "profits" or "earnings." But if the *Cuomo* case had been available back in 2008, the Utah Supreme Court would have never made such an error.

[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.

Respectfully submitted,

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I certify that the *Petition for Rehearing* is presented in good faith and not for delay and is restricted to the grounds specified in Paragraph 2, Rule 44, *Rules of the Supreme Court of the United States*.

July 2, 2009
Date

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